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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 219- 220

LINDSAY POWELL,

Petitioner,

vs. No. 8940

THE UNITED STATES OF AMERICA,

Respondent.

RUSHELL BAILEY,

Petitioner,

vs. No. 8941

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

THEODORE LOCKYEAR,
ELMER Q. LOCKYEAR,
PAUL WEVER,
Evansville, Indiana,
Attorneys for Petitioners.

THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

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No. 8941. *vs.*

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

The petitioners, Lindsay Powell and Rushell Bailey, respectfully petition that Writ of Certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Seventh Circuit, entered after rehearing on the 24th

day of May, 1946, affirming the judgment of the District Court of the United States for the Southern District of Indiana, entered on the 9th day of October, 1945.

The opinion of the United States Circuit Court of Appeals, affirming said judgment, filed May 9, 1946, and the opinion on rehearing, filed on the 24th day of May, 1946, are set out in the Record (Tr. pp. 55-58 and p. 70) and are not yet reported.

I.

Summary and Short Statement of the Matter Involved.

The petitioners were jointly charged by a grand jury indictment in the United States District Court for the Southern District of Indiana with buying goods stolen from an interstate shipment. (Tr. pp. 1, 2.) Pleas of not guilty were entered (Tr. p. 3) and trial was had upon said indictments before a jury, which returned verdicts of guilty as to each of said petitioners. (Tr. p. 25.) Judgment was entered by the District Court upon such verdicts, that the petitioner, Lindsay Powell, be imprisoned and confined for a period of four years; that the petitioner, Rushell Bailey, be imprisoned and confined for a period of three years. (Tr. p. 26.) Separate notices of appeal to the United States Circuit Court of Appeals for the Seventh Circuit were duly given and filed (Tr. pp. 29, 30), and thereafter within the time allowed by law, separate assignments of error were filed (Tr. pp. 31-34), questioning the sufficiency and weight of evidence to sustain the convictions. Said appeals were determined by the United States Circuit Court of Appeals on May 9, 1946, at which time said Court entered its written opinion affirming the judgment of the District Court, Major, Circuit Judge, dissenting. (Tr. pp. 55-58.) That thereafter upon the 15th day of May, 1946, said petitioners filed in said United States Circuit Court of

Appeals their petition for a rehearing. (Tr. pp. 59-63.) Upon said 15th day of May, 1946, said petitioners filed in said Court their petition for a stay of mandate. (Tr. pp. 63-65.) That on the 21st day of May, 1946, the respondent filed in said Court its answer to petitioners' petition for rehearing. (Tr. pp. 66-69.) That thereafter on the 24th day of May, 1946, the United States Circuit Court of Appeals entered an order modifying its written opinion filed May 9, 1946, and denying these petitioners' petition for a rehearing in this cause. (Tr. p. 70.) That thereafter on the 25th day of May, 1946, the United States Circuit Court of Appeals sustained petitioners' motion for a stay of mandate in this cause, pursuant to Rule 25 of said Court. (Tr. p. 71.)

It is to be observed that petitioners did not move for a directed verdict in the trial court, but they sought a review by the United States Circuit Court of Appeals for the Seventh Circuit of the entire record upon the proposition that there was such a lack of evidence in this cause as to make the convictions of the petitioners a miscarriage of justice. It is also to be observed that the petitioner, Rushell Bailey, was represented in the trial court by counsel other than those now appearing for said petitioner.

The indictment (Tr. p. 2) specifically charges the petitioners with the purchase of eight cases of Sunnybrook whiskey, the same being an interstate shipment of freight, having been consigned by the National Distillers Products Corporation of Louisville, Kentucky, to Glencoe Distillery Company, in care of Griswold, Walker and Bateman Company, of Chicago, Illinois, knowing the same to have been stolen.

The evidence before the trial court discloses the following:

The National Distillers Products Corporation of Louis-

ville, Kentucky, shipped 1400 cases of 15 bottles each of Sunnybrook whiskey to Glencoe Distillers Products Company in care of Griswold-Walker & Batman Company, Chicago, Illinois (Tr. p. 13), on July 12, 1945, by Erie Railroad car for storage in a public warehouse. This shipment was fully identified as being an interstate shipment (Tr. 14), and according to J. D. White, a representative of this distiller, had a value of $59.00 per case to a retailer, between $45.00 and $50.00 per case of 12 wholesale. That he probably was a little high on his estimate. Sunnybrook is not bottled in bond, a blend of 51% six year whiskey and 59% neutral spirits. (Tr. p. 15.) The Griswold-Walker & Batman Company received all except 8 cases of the above shipment. (Tr. p. 15.)

The foregoing 8 cases were stolen from said Erie Railroad car by George Stearsman, Mike Jennings and Elvis Morton in Evansville, Indiana, who pleaded guilty in the District Court to the theft of the same. (Tr. pp. 8, 9.) They took the whiskey out Lincoln Avenue in Evansville, and parked, and Stearsman went across the street to see if he could sell it. That was late at night. He came back with information that the fellow couldn't handle it until the next morning, Sunday. Sunday morning they went back at 6 o'clock, stopped across the street from Powell's place. After a bit Morton was waved to drive the car around behind the place, and he drove around in the alley. There were two fellows there, Arrinder Buchanan and Lindsay Powell, who with Morton unloaded the 8 cases. Powell drove off and Morton drove around in front. Morton later went inside. Stearsman and Powell were inside in a back room. Morton had kept the whiskey overnight. The cases were intact and sealed. Morton did not see any money transacted. (Tr. p. 9.) Morton hadn't said anything to Powell while unloading the whiskey on the subject of where this whiskey came from. (Tr. p. 10.) Stearsman knew

Powell had been a bootlegger. Stearsman gave Powell some kind of a story. He thought he told him he got the whiskey in Peoria. Powell was sitting in a car out in front. Stearsman made some kind of a deal with him whereby they would deliver this whiskey. Stearsman told him what he had and he asked what they wanted for it. Stearsman made a price of $40.00 and they agreed on that price. Stearsman testified that was all there was to it. He did not remember if Powell told him why he could not handle it that night. The truck that was used to deliver the whiskey belonged to Mike Jennings. When they went out there Sunday morning, Powell said, "Bring it to the back of the place." Powell paid Stearsman $320.00. He gave him $200.00 and had to get $100.00 from someone else. This payment was made back in the bar back of the Smoke Shop in the bar room. (Tr. p. 11.) Stearsman did not tell Powell he had stolen this whiskey in Peoria or that there was anything wrong with it, or it was hot or not properly stamped. Something was said about the stamps. Stearsman told Powell he did not know whether it had stamps on it or not. The cases were sealed. They opened a case to find out just what it was. (Tr. p. 12.) Ordinarily there were 12 bottles to a case. $40.00 sounded like a good price to Stearsman. Stearsman supposed that $40.00 per case was based upon the supposition that these cases contained 12 bottles. There was some conversation the next morning with Powell because he had gotten a good bargain because there were 15 bottles to a case. Stearsman talked to Powell only two times about the whiskey. Two weeks later Stearsman tried to sell him some more stolen by him at some place else. That time Powell didn't take it. He did give Stearsman enough gas stamps to take it out of town and sell it, five or six gas stamps. There wasn't anybody but Stearsman and a lot of colored people present when this money was paid to Stearsman. (Tr. p. 13.) Arrinder Buchanan,

a witness called on behalf of the government, testified that he knew the defendants, Bailey and Powell, and knew their place at 251 Lincoln Avenue, in Evansville, operating a shine parlor and selling drinks. They called it the Superior Smoke Shop. There was a place in the alley separate from the Smoke Shop. In the rear they had a small bar. (Tr. p. 5.) They sold drinks in the rear. That he worked for Powell for years, but was not working then. He was in their place of business on a Sunday morning, about July 15th, when some men brought some cases of whiskey there. He came by after cleaning up on Sunday morning. There was a big crowd there, and they had a game. About 5:30 or 6 o'clock Powell came by and asked Buchanan to come help him. Bailey was there. A truck drove up in back and to the garage. Powell said help these boys unload these cartons here, and Buchanan told him, all right. Bailey was in the bar. Buchanan went ahead and unfastened the door and helped unload the cartons and unloaded them right down in the garage. When they got them unloaded, one of the fellows said drive around in front, and come in and buy a drink. Buchanan took the cases and took them in the house. He unloaded 8 cartons of cases. Didn't know what was in the cartons. They took them around to Lindsay Powell's house. They didn't put the cases in the bar room. His house is next door. Two men brought the cases that morning. They were white men. (Tr. p. 6.) Morton and Stearsman were requested to stand in the court room and Buchanan identified one and not the other. When the packages were unloaded, Mr. Bailey was not there, he was in the bar. Buchanan first saw Bailey after he unloaded the whiskey off the truck. At that time Bailey was inside. Buchanan couldn't tell where Bailey was when the packages were unloaded, he didn't see him. (Tr. p. 7.) Bailey wasn't there at all when they were unloading whiskey. Buchanan didn't hear anything said by either of these two

men to Lindsay Powell as to where they had gotten those packages. Wasn't a word said. There wasn't anything done to hide those packages there. They were unloaded in the back end of the Smoke Shop nearest the alley. The bar part of the Smoke Shop is nearest to the alley. Come right out of the door into the garage. (Tr. p. 8.)

Elvis Morton, a witness called on behalf of the government, testified that he never saw Bailey until at the police station. (Tr. p. 9.) George Lawton Stearsman testified that he did not know who was there. That he did not know if Bailey was there, to tell the truth, whether he was. (Tr. p. 11.) That he did not see Rushell Bailey that night. He might have the next morning. If he did, he didn't know it. (Tr. p. 12.)

The jury was instructed to disregard the testimony of Marvin Huff, insofar as it was material. (Tr. p. 19.)

II.

Basis Upon Which It Is Contended That the Supreme Court Has Jurisdiction to Review the Judgment in Question.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code as amended. 28 U. S. C. A. 347.

This petition is directed to the sound judicial discretion of the Supreme Court for the reason that the United States Circuit Court of Appeals has (a) decided an important question of federal law, which has not been, but which should be settled by the Supreme Court of the United States, and (b) has decided a federal question in such a way as to be in conflict with the applicable decisions of the Supreme Court.

The petition for rehearing in this cause was determined by the United States Circuit Court of Appeals for the Seventh Circuit upon the 24th day of May, 1946, the opinion affirming the judgment of the United States District Court

for the Southern District of Indiana, having been entered upon the 9th day of May, 1946.

III.

The Questions Presented.

This petition for writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit questions the correctness of their decision and judgment in this cause of action, whereby the decision and judgment of the United States District Court for the Southern District of Indiana was affirmed. The petitioners herein take the position that said decision of the United States Circuit Court of Appeals for the Seventh Circuit is erroneous in that it sustains their convictions despite an insufficiency of evidence to sustain same, and that in the case of Rushell Bailey, there is an entire absence of evidence to sustain the conviction, and that the Supreme Court of the United States, upon authority of *Johnson* v. *United States*, 318 U. S. 189; 87 L. Ed. 704; 63 S. Ct. 549, affirming C. C. A. (3); 129 Fed. 2nd, 954; 144 A. L. R. 182, may of its own motion take notice of said error, despite the failure of petitioners to move for a peremptory instruction in the trial court, for the reason that said judgments of conviction, if permitted to stand, would seriously affect the fairness, integrity or public reputation of judicial proceedings.

IV.

The Reasons Relied Upon for the Allowance of the Writ.

The Writ of Certiorari as herein prayed should be granted for the reason that the United States Circuit Court of Appeals for the Seventh Circuit has erroneously decided an important question of federal law and has decided a

federal question in such a way as to be in conflict with the applicable decisions of the Supreme Court. The petitioners stand convicted in a cause in which the evidence as to one of them, Lindsay Powell, is insufficient to sustain the conviction; as to the other, Rushell Bailey, there is a total lack of evidence to sustain the conviction.

Despite their failure to interpose a timely objection in the trial court, the Supreme Court of the United States has the power to take notice of errors so obvious on the face of the record as here presented, and enter a reversal of the cause for the reason that the fairness, integrity or public reputation of judicial proceedings is involved.

WHEREFORE, the petitioners herein respectfully pray that a Writ of Certiorari may issue out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, to the end that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit may be reviewed and reversed by this Honorable Court.

Respectfully submitted,

LINDSAY POWELL,
RUSHELL BAILEY,
Petitioners,

By THEODORE LOCKYEAR,
ELMER Q. LOCKYEAR,
PAUL WEVER,
Attorneys for Petitioners.

Dated at Evansville, Indiana,
June 19, 1946.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. .....

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vs.

THE UNITED STATES OF AMERICA,

Respondent.

RUSHELL BAILEY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

I.

The Opinion.

The petitioners herein, by petition for writ of certiorari, seek a review of a judgment and opinion of the United States Circuit Court of Appeals for the Seventh Circuit,

which judgment and opinion was filed May 9, 1946, and the opinion on rehearing filed on the 24th day of May, 1946, and are set out in the Record (Tr. pp. 55-58 and p. 70), and are not yet reported.

II.

Statement of the Grounds on Which the Jurisdiction of the United States Supreme Court Is Invoked.

This statement is set out in the preceding petition under that part of same denominated "II. Basis Upon Which it is Contended that the Supreme Court has Jurisdiction to Review the Judgment in Question", pages 7 to 8 of same, which is hereby adopted and made a part of this brief by reference.

III.

Statement of the Case.

A concise statement of the case, containing all that is material to a consideration of the questions presented is set out in the preceding petition under that part denominated "I. Summary and Short Statement of the Matter Involved", pages 2 to 7 of same, which is hereby adopted and made a part of this brief by reference.

IV.

Specification of the Error Intended to Be Urged.

This specification is set out in the preceding petition under that part denominated "III. The Questions Presented", page 8 of same, which is hereby adopted and made a part of this brief by reference.

V.

Argument.

Summary of the Argument.

(a) The entire record in this cause reveals such a lack of evidence as to make the convictions of the petitioners a miscarriage of justice. The United States Supreme Court has power to review the entire record, regardless of the condition of same, including the failure of petitioners to move for a directed verdict and to enter a reversal of this cause.

(b) It was incumbent upon the Government in the trial of this cause to prove petitioners received the whiskey in question, knowing it to have been stolen. It is not *per se* criminal to receive stolen property. Failure to show that Bailey and Powell, beyond all reasonable doubt, knew the property to have been stolen, entitled the petitioners to an acquittal.

(c) The Circuit Court of Appeals in its original opinion, erroneously interpreted the case of *U. S.* v. *Atkinson* (1936), 297 U. S. 157, 160; 57 S. Ct. 391, 392; 80 L. Ed. 555, and upon petition for a rehearing, instead of correcting their judgment to conform to this precedent of the Supreme Court, they modified their opinion by omitting reference to this citation.

ARGUMENT.

The attention of the court is first directed to the status of the record as to the petitioner, Rushell Bailey. *There is not a word of evidence in this record that supports the verdict of guilty against him.* As to him, it is not a question of the sufficiency of the evidence, for there is a *total lack* of evidence. This petitioner is hardly mentioned in the testimony, and the following is all the reference that is made as to him.

Arrinder Buchanan testified:

> "I know the defendants Rushell Bailey and Lindsay Powell. I know where their place of business is at 251 Lincoln Avenue in the City of Evansville. They operate a shining parlor. At that time they were selling drinks. They called it the Superior Smoke Shop. They had a small bar. They sold drinks in the rear. (Tr. 5.) A truck drove up. Bailey was there. Bailey was in the bar. They went on through where Rushell was. (Tr. 6.) When the truck came up, Bailey was not on the outside. When the packages were unloaded Mr. Bailey wasn't there. He was in the bar. The first time I saw Bailey was after I unloaded the whiskey off the truck. (Tr. 7.) At that time Bailey was inside. I couldn't tell you where Bailey was when the packages were unloaded. I didn't see him. Bailey wasn't out there at all when we was unloading whiskey." (Tr. 8.)

Elvis Morton testified:

> "I never saw Bailey until at the police station. Never saw him that morning." (Tr. 9.)

Stearsman testified:

> "I did not know who was in there. I did not know if Bailey was there, to tell the truth, whether he was.

(Tr. 11.) I did not see Rushell Bailey that night. I might have next morning. If I did, I don't know it." (Tr. 12.)

The jury was instructed to disregard the testimony of Marvin Huff. (Tr. 19.)

The petitioner, Rushell Bailey respectfully submits that this foregoing testimony, and that is all there is, is not sufficient to sustain the burden that was on the government. It does not prove that Bailey had possession of this stolen whiskey at any time. It does not prove that he knew it was stolen. Certainly there has been a miscarriage of justice as to this petitioner. The petitioner, Bailey's right to a reversal is so clear that further comment is deemed unnecessary.

When it is considered that the jury in this cause exhibited such a readiness to convict the petitioner Bailey without any proof, it is not surprising that they likewise convicted the petitioner Powell. The proof as to Powell is sufficient to sustain the proposition that he had possession of the stolen goods, but utterly fails to disclose that he had knowledge that it was stolen. What is the proof upon this subject with respect to Powell? Stearsman approached him upon a Saturday night relative to the sale of 8 cases of whiskey. He said he could not handle it that night, but to come back the next day. No reason is advanced by any witness as to why he did not accept it that night. The next day they returned, and the same was unloaded in the rear of his place of business next to his bar room, in the plain view of everyone. What the conversation was between Powell and Stearsman is not quite clear. It must be remembered that the government had the burden upon this issue. The whiskey was taken to Powell's house next door, and Powell paid Stearsman in cash, $40.00 per case, which Stearsman thought was a

good price. Some time later, Stearsman attempted to sell him some other merchandise, but Powell would not take it. There is injected into the record the fact that Powell gave Stearsman some gas stamps. This is surely immaterial and incompetent.

The petitioners, Rushell Bailey and Lindsay Powell respectfully urge that the foregoing record in this cause shows an insufficiency and lack of evidence to sustain their convictions. Readily do they admit that in the trial court no motion was made for a peremptory instruction. This Court is fully authorized to review the record in these cases and determine this issue of the sufficiency of the evidence. In this respect, the petitioners call the attention of the Court to the opinion of Chief Justice Stone in *U. S.* v. *Atkinson* (1936), 297 U. S. 157, 160; 56 S. Ct. 391, 392; 80 L. Ed. 555:

> "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings."

This rule has been specifically applied in cases in which there was no request that the jury be directed by the trial court to acquit the defendant. For example, see the case of *Sykes* v. *U. S.* (1913), 204 Fed. 909, 913, 914; 123 C. C. A. 205, 209, wherein the court made this observation:

> "To escape from the effect of this conclusion, counsel challenge our attention to the fact that no request for a peremptory instruction to return a verdict for Sykes was made at the trial, and invoke the conceded rule that the court may not review the existence of evidence to sustain a verdict, in the absence of a request after the close of the evidence for a peremptory instruction. * * * But, there is an exception to this general rule which has been made to prevent just

such gross injustice as would result from the punishment of the defendant Sykes upon the evidence which has been recited. It is that in criminal cases, where the life, or as in this case the liberty, of the defendant is at stake, the courts of the United States, in the exercise of a sound discretion, may notice such a grave error as his conviction without evidence to support it, although the question it presents was not properly raised in the trial court by request, objection, exception, or assignment of error."

The Court's attention is also called to the case of *Crawford* v. *U. S.* (1908), 212 U. S. 183, 194; 53 L. Ed. 465; 29 S. Ct. 260, 264:

> "In criminal cases courts are not inclined to be as exacting with reference to the specific character of the objection made as in civil cases. They will, in the exercise of a sound discretion, sometimes notice error in a trial of a criminal case, although the question was not properly raised at the trial by objection and exception."

The Court's attention is also called to the case of *Wiborg et al.* v. *U. S.* (1896), 163 U. S. 632, 659; 16 S. Ct. 1127, 1137; 41 L. Ed. 289, 299:

> "And, although this question was not properly raised, yet if a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it."

Other cases sustaining the position of the petitioners in this respect are as as follows:

Johnson v. *U. S.* (1943), 318 U. S. 189, 200; 63 S. Ct. 549, 555; 87 L. Ed. 704.

Feinberg v. *U. S.* (1924), 2 Fed. 2d, 955, 956, 957 (C. C. A.).

Gillette v. *U. S.* (1916), 236 Fed. 215, 218; 149 C. C. A. 405.

Wright v. *U. S.* (1915), 227 Fed. 855, 857; 142 C. C. A. 379, 381.

In considering the evidence in this case, it is important to bear in mind that under all the circumstances revealed, that Powell never made any inconsistent statement concerning his possession of this whiskey. That he made no attempt to conceal his possession of same. That he made no attempt to sell for less than a fair value. That he made no contradictory explanation of his possession of same, which are all elements which are ordinarily found in cases in which convictions have been upheld. While it might be said that the government sustained their burden on the question of the proof of possession on the part of Powell, they failed to offer evidence of any other circumstances or facts from which an inference could be drawn that Powell knew this property was stolen. The petitioner cites the court to the case of *Gargotta* v. *United States* (1935), 77 Fed. 2d, 977, 981, 983, 984:

> "The defendant is presumed to be innocent, and this presumption is a real presumption in his favor which abides with him at every stage of the trial. The burden of proof was on the government to prove his guilt beyond a reasonable doubt. No principles of criminal law are more firmly fixed than these. They have been proclaimed by every court of record throughout the land. They go to the very basis of our liberties. * * *
>
> "This court has frequently announced and committed itself to the rule: 'Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of this court to reverse a judgment against the plaintiffs in error.' * * *
>
> "The cases relied upon by the government as

authority for its contention that the fact of possession standing alone is some evidence to be considered with all the other facts are cases where the other evidence or circumstances relied upon are of an entirely different nature, and upon examination will disclose that there was inconsistent statement, attempt to conceal, an attempt to sell for less than the fair value, spoliation, fabrication, suppression of evidence, or contradictory explanations of the possession, all of which are entirely absent in the case at bar. * * *

"The circumstances relied upon, that the defendant was found in possession of the pistols, that they had stamped thereon the words 'United States Property', we believe are just as consistent with the innocence of the defendant as with his guilt in this case, and we have been unable to find substantial evidence of fact which excludes every other hypothesis than that of guilt. * * *

"After a careful study of the authorities, and a scrutiny of the evidence, we are unable to divest our minds of the conclusion that there was not sufficient evidence of guilt of the defendant to sustain the verdict."

And also the case of *Wolf* v. *U. S.* (1923), 290 Fed. 738, 744, (C. C. A.):

"It is not *per se* criminal to receive stolen property. The crime consists in receiving it, knowing it to have been stolen. It is not admissible to introduce evidence which merely shows that the accused had in his possession other stolen property. The possession of stolen goods, where the possessor is not charged with their larceny, is regarded as innocent, unless shown to have been received with knowledge that they were stolen, or under circumstances which would satisfy the jury that the possessor believed them to be stolen."

The United States Circuit Court of Appeals for the Seventh Circuit in two cases, made the following statements:

"Suppositions are not sufficient to support a conviction."

Caringella v. *U. S.* (1935), (C. C. A.) 78 Fed. 2d, 563, 566.

"There must be at least some suggestion that a buyer knows that a sellor is disposing of stolen goods before the buyer can be held in a criminal action to have participated in the crime."

Cherry v. *U. S.* (1935), (C. C. A.) 78 Fed. 2d, 334 336.

The following additional citations sustain the petitioners in this respect.

68 A. L. R. 187.
105 A. L. R. 1289.
147 A. L. R. 1066.
Stemple v. *U. S.* (1923), (C. C. A.) 287 Fed. 132.
Pounds v. *U. S.* (1920), (C. C. A.) 265 Fed. 242.
Kasle v. *U. S.* (1916), (C. C. A.) 233 Fed. 878.

The United States Circuit Court of Appeals in its original opinion in this cause, by Mr. Justice Minton, erroneously quotes from the opinion of Mr. Chief Justice Stone, in *U. S.* v. *Atkinson, supra,* and interposes the word "and" instead of the word "or" in quoting from that portion of the opinion which states: "Appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings".

Despite the erroneous interpretation of this case, Major, Circuit Judge, dissented as to Rushell Bailey, and made the following pertinent observations as to said petitioner:

"Notwithstanding the question as to the sufficiency

> of the evidence was not raised in the court below by a motion for directed verdict or otherwise, it was asserted in this court that there was no evidence justifying a submission of his case to the jury and consequently no proof upon which the judgment of conviction can rest. An examination of the record discloses that this assertion is well founded. It appears to me that a judgment of conviction wholly unsupported by any competent testimony presents a direct challenge to the 'fairness, integrity or public reputation of judicial proceedings.' ".

By their petition for rehearing petitioners called the attention of the United States Circuit Court of Appeals to the fact that that court had erroneously quoted and interpreted the case of *U. S.* v. *Atkinson, supra,* and pointed out to the Circuit Court of Appeals that the test to be applied is whether or not the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings. Upon petition for rehearing, and upon the 24th day of May, 1946, the Circuit Court of Appeals entered an order modifying its written opinion by eliminating from their said opinion the language which they had erroneously quoted from the opinion in *U. S.* v. *Atkinson, supra,* and entered an order denying the petition for rehearing. The petitioners do not criticise the Circuit Court of Appeals for eliminating language from their opinion which is a mistaken quotation from an opinion of the Supreme Court of the United States. They do, however, question the correctness of that court's opinion with this erroneous quotation eliminated, and respectfully urge that the foregoing statement of facts justifies the Supreme Court of the United States in granting the petition for Writ of Certiorari as herein prayed.

When all the evidence in this cause is carefully considered, it is impossible that verdicts of guilty against

these petitioners be sustained. As to Bailey, there is a complete failure of proof. As to Powell, there is a failure of proof with respect to the controlling issue of the case, that is, his knowledge of the stolen character of this merchandise. The petitioners earnestly contend that the Writ of Certiorari as herein prayed should be granted.

Respectfully submitted,

LINDSAY POWELL,
RUSHELL BAILEY,
Petitioners,

By THEODORE LOCKYEAR,
ELMER Q. LOCKYEAR,
PAUL WEVER,
Attorneys for Petitioners.

Dated at Evansville, Indiana, June 19, 1946.

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703258—46

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 219

LINDSAY POWELL, PETITIONER

v.

THE UNITED STATES OF AMERICA

No. 220

RUSHELL BAILEY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The majority and dissenting opinions in the circuit court of appeals (R. 55–57, 70) have not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered May 9, 1946 (R. 58) and a petition for rehearing was denied May 24, 1946 (R. 70). The petition for a writ of certiorari was filed

June 20, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a) of the Federal Rules of Criminal Procedure, effective March 21, 1946.

QUESTION PRESENTED

Whether petitioners' convictions should be reversed for insufficiency of evidence.

STATEMENT

An indictment in one count was returned in the United States District Court for the Southern District of Indiana charging petitioners with the purchase of eight cases of Sunnybrook whiskey that had been stolen from an interstate shipment, knowing the whiskey had been stolen (18 U. S. C. 409)[1] (R. 2). After a jury trial, at which they were represented by counsel, petitioners were found guilty as charged (R. 25). Powell was sentenced to imprisonment for four years and Bailey to imprisonment for three years (R. 26). On appeal to the Circuit Court of Appeals for the Seventh Circuit the convictions were affirmed (R. 55–57), one judge dissenting as to affirmance of Bailey's conviction (R. 57).

The evidence for the Government is summarized in the Argument, *infra*.

[1] This statute penalizes "Whoever * * * shall buy or receive or have in his possession any * * * goods or chattels [stolen from an interstate shipment], knowing the same to have been stolen."

ARGUMENT

Relying principally upon *United States* v. *Atkinson*, 297 U. S. 157,[2] petitioners, who failed to challenge the sufficiency of the evidence at any stage of the proceedings in the trial court, contend here, as they did in the circuit court of appeals, that their convictions should be reversed because "there was such a lack of evidence in this cause as to make" their convictions "a miscarriage of justice" (Pet. 3, 8–9, 12, 16, 20–22). This contention has no merit, at least with respect to petitioner Powell.

An examination of the entire record reveals the following substantial[3] uncontradicted evidence for the Government:[4] Eight cases of Sunnybrook whiskey (fifths) were stolen from an interstate shipment, at Evansville, Indiana, by Elvis Morton, George Stearsman, and Mike Jennings, at about

[2] "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings." *United States* v. *Atkinson*, 297 U. S. 157, 160.

[3] The question is not whether the Government's evidence showed guilt beyond a reasonable doubt (See Pet. 13), but whether there was substantial evidence to support the verdict, it being for the jury to determine whether "the effect of the evidence was such as to overcome any reasonable doubt of guilt." *Pierce* v. *United States*, 252 U. S. 239, 251–252.

[4] Petitioners did not testify and offered no evidence in their defense.

midnight July 14, 1945. Stearsman knew petitioner Powell had been a bootlegger, and so, with Jennings and Morton, he took the whiskey, in a small truck, to 251 Lincoln Road, Evansville, where the two petitioners operated a "shining parlor," called the Superior Smoke Shop, in the rear room of which they had a bar where they sold drinks. Stearsman found petitioner Powell seated in a car parked in front of the smoke shop, and "gave him some kind of a story" about the whiskey and asked Powell if he would buy it. He "didn't tell [Powell] there was anything wrong with this whiskey or it was hot or not properly stamped," but did tell Powell that he "didn't know whether it had stamps or not on it." They agreed on a price of $40 per case,[5] Powell saying, "he couldn't handle it that night but to bring it the next morning." At about 5:30 the next morning (Sunday) Stearsman and Morton again took the whiskey to petitioners' place of business and, following Powell's instructions, drove the truck around to the alley in back of the smoke shop where Powell, Stearsman, Morton, and one Buchanan unloaded the whiskey. Morton then drove the truck around to the front, while Stearsman went inside to the bar where "there were a lot of people * * * having drinks," and where Powell paid Stearsman $320 in cash. During the

[5] "The wholesale price on fifths, twelve to a case, of Sunnybrook Whiskey would be somewhere between $45.00 and $50.00", possibly a little lower, plus $9 per case for Indiana State tax (R. 14, 15).

unloading of the whiskey petitioner Bailey was inside, in the bar. After the whiskey was unloaded, Buchanan went back inside to the room next to the bar, where a crap game was in progress. There was some conversation about the bargain petitioner Powell had gotten when it was discovered that each of the eight cases contained 15 bottles (fifths) instead of the expected 12 bottles. Within the next few weeks Stearsman tried to sell Powell some more stolen whiskey. Powell did not take it but gave Stearsman five or six gas stamps to take it out of town and sell it. (R. 5–13.) No state permit had ever been issued to the petitioners singly or jointly, or the smoke shop, to purchase or sell liquors (R. 16).

It is clear, we believe, that this evidence was sufficient to sustain petitioner Powell's conviction. Although there was no evidence that he actually knew the whiskey was stolen,[6] the circumstances under which it was acquired were sufficient to show that petitioner Powell could not have believed

[6] The court's charge with respect to this element of the crime was as follows (R. 22–23): "You may further believe from the evidence which seems to be uncontradicted that the merchandise, eight cases of whiskey, were stolen by the three persons named in the indictment.

"If you believe that, and there seems to be no contradiction upon that subject, then you come to the question, and the only question in this case to determine, that is, whether or not these defendants bought and received this whiskey knowing at the time they so bought it that it had theretofore been stolen.

"So the issue is very simple so far as the jury is concerned. I think the attorneys, especially one of the attorneys, in his

otherwise than that he was buying stolen goods. Petitioners had no permit to buy whiskey; they were operating an illicit bar and gambling room behind a "shine parlor" front; the whiskey was offered to Powell shortly after midnight and he agreed to pay $40 per case without even seeing it; and he had it delivered early Sunday morning when it was hardly light, paying in cash a price considerably less than the prevailing wholesale

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argument stated that was the issue in this case, as to whether or not these defendants purchased that whiskey and whether or not at the time they purchased it they knew it was stolen whiskey.

"Circumstantial evidence, ladies and gentlemen, is legal evidence. So you should consider all the circumstances in this case, as well as the oral testimony in determining the guilt or innocence of these defendants. Of course, if the government relies upon circumstantial evidence alone, it then must point so clearly to the guilt of the defendant that no other conclusion can be reached than that of guilt before they can be convicted upon circumstantial evidence, alone.

"Now, what are the circumstances? You heard the evidence in this case. Delivered early Sunday morning, taken to the home of one of these defendants, where it was stored—type of business, they were running—price paid—it is always an item that a jury should consider in a case of this kind, whether a price much less than the real value of the merchandise is paid. That does not necessarily mean that they had knowledge that it was stolen property, but that is just one circumstance along with all the other circumstances in determining whether or not these defendants knew that this property or this merchandise was stolen, if you find from the evidence that they did purchase such merchandise, $40 a case, Sunnybrook whiskey, 15 bottles to the case, which would be even three gallons, as I figure it—the exhibits might indicate they sold by the drink—those are things that you will consider when you go to determining whether or not these defendants are guilty as charged."

price for a bona fide purchase. The statement (Pet. 18) that aside from proving possession the Government "failed to offer evidence of any other circumstances or facts from which an inference could be drawn that Powell knew this property was stolen" is thus not supported by the record.

We believe, however, that petitioner Bailey's contention that the evidence was insufficient to sustain his conviction is, as stated in the dissenting opinion (R. 57), "well founded." The only evidence tending to connect Bailey with the crime was the testimony of the witness Buchanan who had known both petitioners for several years (R. 5). Referring to petitioners, Buchanan testified on direct examination that (R. 5–6):

> * * * They operate a shining parlor. At that time they were selling drinks. They called it the Superior Smoke Shop. There was a place in the rear that was separate from the Smoke Shop. They had a small bar. That was in the rear. They sold the drinks in the rear. * * *

Referring to what happened Sunday morning, July 15th, Buchanan testified that (R. 6):

> * * * There was a big crowd there and stay around there, and they had a game, and I stayed around there for the game, and along about—I took it to be along about 5:30 or 6:00 o'clock Lindsay [Powell] come by and asked me to come help him. I went and helped him. I went in the back with Lindsay and he told me to come and

help him a little while and I come and helped him. A truck drove up. Bailey was there. A truck drove up in the back, and to the garage, and he said, "Help these boys unload these cartons here," and I told him all right. Bailey was in the bar. And I went ahead on and went on and unfastened the door and helped unload the cartons and unload it right down in the garage, and we got them unloaded and one of the fellows said, "Drive around in front and come in and buy a drink," and we got them unloaded and after we got them unloaded, told me to take some stuff around the house. They went on through where Rushell [Bailey] was and I took the cases and took them on in the house, and I come on back, and I was going to get back in there into the crap game and I come onto the crap game. * * *

On cross examination Buchanan testified that:

When the truck came up there Bailey wasn't on the outside. When the packages were unloaded Mr. Bailey was not there. He was in the bar.

Question: I believe you testified after you unloaded the packages that you went into the bar and that was when you saw Bailey?

Answer: No sir.

Question: When was the first time you saw Bailey?

Answer: I said after I unloaded the whiskey off the truck, down into the garage, Lindsay and one of the white fellows went

inside. Lindsay told me to take the whiskey around to his house and the other boy with the truck went around in front so he told him to go around in front.

At that time Bailey was inside. I couldn't tell you where Bailey was when the packages were unloaded. I didn't see him.

Question: And these conversations that you referred to, Mr. Bailey wasn't there at any of those conversations, was he?

Answer: Bailey wasn't out there at all when we was unloading whiskey." (R. 7–8.)

No other evidence as to Bailey's connection with the crime was admitted.[7] Stearsman and Morton, who delivered the whiskey, could not even identify Bailey as having been at the smoke shop.[8]

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[7] The trial court held inadmissible, as incompetent, the statements made by petitioners after they were taken into custody (R. 19), and instructed the jury to disregard this evidence (R. 23). Consequently, the testimony of Huff, police officer, that Bailey, after his arrest, admitted he and Powell had bought the whiskey from Stearsman and Morton for $320, and that Bailey showed the officers where to find some of the empty and broken bottles in the ash pit behind the smoke shop (R. 17–19), may not be relied upon to show Bailey's guilt.

[8] Morton: "I never saw Bailey until at the police station. Never saw him that [Sunday] morning" (R. 9).

Stearsman: "I would not know if Bailey was there, to tell the truth, whether he was" (R. 11). "I didn't see Rushell Bailey that night. I might have next morning. * * * If I did I don't know it" (R. 12). "Bailey could have been there but I couldn't say whether he was or not" (R. 13).

Since there was no substantial evidence that Bailey knew the whiskey was stolen, or even that he participated in its purchase, we believe that the trial court should have directed a verdict of acquittal as to him, and that therefore the circuit court of appeals erred in refusing to reverse his conviction. Cf. *United States* v. *Atkinson,* 297 U. S. 157, 160 (see fn. 2, p. 3, *supra*).

CONCLUSION

For the reasons stated we respectfully submit that as to Powell the petition for a writ of certiorari should be denied, and that as to Bailey the petition for a writ of certiorari should be granted and the judgment of the court below reversed. We think this may appropriately be done as to Bailey without further briefs or argument since the record is not voluminous and the issue is narrow. Cf. *Oriolo* v. *United States,* 324 U. S. 824.

J. HOWARD MCGRATH,
Solicitor General.
THERON L. CAUDLE,
Assistant Attorney General.
W. MARVIN SMITH,
Special Assistant to the Attorney General.
ROBERT S. ERDAHL,
ANDREW F. OEHMAN,
Attorneys.

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